Supreme Court, U.S.
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No. 10-635

In The
Supreme Court of the United States

TOWNSHIP OF LIBERTY, OHIO, et al.,

Petitioners,

v.

WEDGEWOOD LIMITED PARTNERSHIP I,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case and Facts intertwines state and federal proceedings with detail that is not germane to this Court's consideration of the Petition. Despite this, their description of the case betrays their call for a writ of certiorari. Petitioners note that, if the restrictions they imposed on Respondent's land exceeded the existing zoning regulations, as the lower courts found, then "a due process analysis [is] necessary to determine whether Petitioners followed state procedural requirements for zoning amendments" and whether they violated due process protections. (Petition, at 5.) That is, Petitioners focus on a predicate factual question that formed part of the Sixth Circuit's resolution of whether Ohio law recognizes a property interest in the circumstances of this case.

This litigation arises from the public hysteria that ensued when Respondent planned to build a Wal-Mart store on land that it owned on the outer fringes of the Columbus, Ohio metropolitan area. The Sixth Circuit described the public uproar aptly, quoting a resident who asked whether the local politicians could "do anything about" the Wal-Mart store; the sentiment only "intensified" when Respondent submitted an application for a building permit. (Petition Appx., at 6a, 7a.) Petitioners have acknowledged their awareness of the "evident" and "significant public opposition to the proposed Wal-Mart." (Petition Appx., at 182a.) Indeed, opposition to the store was so spirited that local homeowners'

associations formed an interest group and intervened in the litigation in the district court. (Petition Appx., at 40a, 73a & n.10.)

Local opposition to the Wal-Mart store resulted in two distinct official acts. One, Petitioner Township Board of Trustees issued "Instructions" – instead of following the mandatory democratic process for enacting zoning regulations – that imposed an absolute 500,000 square-foot limit on the amount of total commercial development in the area where the store would have been located. Two, Petitioner Township Zoning Inspector and the Board of Zoning Appeals denied Respondent's application for a zoning permit to build the Wal-Mart store.

These two official acts resulted in two distinct litigations: (1) this federal lawsuit, which primarily challenges the 500,000 square-foot limit, and (2) a state-law administrative appeal, which challenged the denial of Respondent's application for the building permit. Although there is some analytical overlap, the state and federal litigations considered different official acts by the Petitioners and sought different remedies. The Sixth Circuit's description is helpful: "[a]lthough each proceeding requires an interpretation of the [zoning requirements], the harm alleged and the relief sought are distinct." (Petition Appx., at 14a.) The federal court ruling that Petitioners ask this Court to review concerns only the "claim that [Petitioners] violated [Respondent's] procedural due process rights by enacting the [500,000 square-foot

limit on commercial development] without notice and a public hearing." (*Id.*)

Throughout their brief, Petitioners conflate the state court proceedings and the federal proceedings. The opening line of Petitioners' Statement of the Case and Facts characterizes their request for a writ of certiorari as "arising out of" the decision to "deny zoning approval" of Respondent's application to build the Wal-Mart store. (Petition, at 2.) That is an accurate description of the now-terminated state-court litigation, but it is not an accurate description of this federal litigation. When the Sixth Circuit rejected Petitioners' argument that the due process claim was mooted by Wal-Mart's decision to abandon plans for constructing the store – after years of delay at the hands of Petitioners – it held that "the evaporation of Wal-Mart's offer to purchase [the property] does not extinguish [Respondent's] legally cognizable interest in securing a judgment that enforces its right to develop its property according to the . . . zoning as it existed" before Petitioners imposed their illegal limit on commercial development. (Petition Appx., at 13a.)

Petitioners' description of the case blurs this critical distinction. The state proceedings, in which Respondent appealed the denial of its application for a building permit, are over; the state courts determined that Respondents' appeal became moot when Wal-Mart decided to abandon the project. (Petition Appx., at 222a, 234a.) The state courts never faced the question raised in these federal proceedings: whether Petitioners violated Respondent's federal

constitutional rights by illegally adopting the absolute 500,000 square-foot limit on commercial development. The District Court's injunction, affirmed by the Sixth Circuit, does not affect the state courts' rulings on Respondent's application for a building permit; it prohibits Petitioners from enforcing the illegal 500,000 square-foot limit on commercial development. The district court issued the injunction after concluding that the limit violated Respondent's procedural due process rights, violated state law, and was void for vagueness. (Petition Appx., at 58a, 61a.)

The Sixth Circuit affirmed the injunction on an interlocutory appeal. It found that Petitioners could not enforce the 500,000 square-foot limit without giving the affected landowners proper notice and an opportunity to be heard. (Petition Appx., at 27a-28a.) It then rejected Petitioners' request for en banc rehearing, with no judge requesting an en banc vote. (Petition Appx., at 135a-136a.)

ARGUMENT

A. Introduction

Petitioners have not met the requirement of Supreme Court Rule 10 that there must be compelling reasons for the Court to issue a writ of certiorari. The two questions they offer for review would not be dispositive even of this litigation. In the order appealed from, the District Court granted an injunction after finding that Petitioners' illegal imposition of

new zoning "regulations" violated procedural due process, the void-for-vagueness prohibition, and state law, but their Petition for Writ of Certiorari challenges only the procedural due process ground. Moreover, Petitioners candidly admit that their challenge to the procedural due process ruling turns on a question of state law regarding Respondent's property interests. In other words, Petitioners want this Court to answer a question about Ohio property law in a ruling that will have no effect on the order they are attempting to appeal.

Petitioners offer two reasons for the Court to exercise its jurisdiction. *First*, they claim that the Sixth Circuit Court of Appeals transformed itself into "a zoning board of appeals" and "create[d] a federal law of zoning." (Petition, at i.) Their argument confuses this *federal court litigation*, in which Respondent alleged, *inter alia*, that Petitioners violated its procedural due process rights by illegally imposing new zoning regulations, with the earlier *state court litigation*, in which Respondent appealed from Petitioners' denial of its application for a zoning certificate to build a Wal-Mart store.

The Court of Appeals did not create "a federal law of zoning" in this case. It applied state property law to determine the extent of Respondent's property interests, and then applied federal constitutional law to determine whether those property interests are protected by the federal Due Process Clause. This is the analytic framework that was adopted in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and later

reaffirmed in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). It is not a "federal law of zoning," although local officials' zoning regulations – like all their official acts – must comply with federal due process guarantees. Petitioners' real argument is that the Court of Appeals misinterpreted Ohio state law that defines the scope of Respondent's property interests. That issue does not warrant this Court's review.

Second, Petitioners claim that a writ of certiorari should issue in this case because the Court of Appeals misinterpreted the abstention doctrine "solely to effectuate its federal law of zoning." (Petition, at i.) However, they never explain or support that accusation, and there is no evidence that the appellate panel had any ulterior motives. In any event, its decision explains that it did not review the abstention ruling in this interlocutory appeal from the District Court's injunction order because the abstention ruling was made in the District Court's separate order on Petitioners' motion to dismiss, which has not yet been appealed. (Opinion and Order, 456 F.Supp.2d at 927-930.)

There are no compelling reasons for this Court to expend its time and resources on either of the two questions that Petitioners have presented for review. The District Court and Court of Appeals followed exactly the same due process and abstention legal principles that the other circuits follow, consistent with previous rulings by this Court. Petitioners' request for a writ of certiorari should be denied.

B. There are no compelling reasons for this Court to review the Court of Appeals' ruling on Respondent's procedural due process claim.

1. The United States Court of Appeals for the Sixth Circuit is not attempting to create "a federal zoning board of appeals."

Petitioners argue that this Court's review is necessary because "[t]he Sixth Circuit . . . [is] acting as a federal zoning board of appeals, under which landowners will obtain results more favorable than those they could have obtained in state court." (Petition, at 9.) Their argument confuses the federal court proceedings in this case, in which both lower courts found that Petitioners' illegal adoption of new zoning regulations violated, *inter alia*, Respondent's procedural due process rights, with the former state court proceedings, in which Respondent appealed from Petitioners' decision to deny its application for a building permit.

When Petitioner Zoning Inspector denied its application (Petition Appx. G), Respondent appealed to the Township Board of Zoning Appeals, which affirmed the Zoning Inspector's decision. (Petition Appx. H.) Respondent appealed that ruling to the Court of Common Pleas of Delaware County, Ohio, which found no clear legal basis for denying Respondent's application and remanded the case for further proceedings. (Petition Appx. I.) On remand, the Board of Zoning Appeals again upheld Petitioner Zoning

Inspector's denial of Respondent's application. (Petition Appx. J.) Respondent appealed to the Court of Common Pleas for a second time, but it held that the appeal had become moot because Respondent's option contract to sell the property to Wal-Mart had expired during the years of litigation between the parties. (Petition Appx. K.) The Ohio Court of Appeals affirmed that ruling (Petition Appx. L), and the Supreme Court of Ohio denied discretionary review. (Petition Appx. M.)

In short, Respondent appealed Petitioners' denial of its application for a building permit through the Ohio *state court* system, which they acknowledge was the proper forum. Respondent pursued its claim that the illegal adoption of the new zoning "regulation" violated its procedural due process rights through the *federal courts*. The Sixth Circuit specifically pointed out in its decision that this is the "key distinction between Wedgewood's federal and state litigation. *Wedgewood's state court proceedings challenge the zoning inspector's denial of its application for a zoning certificate. . . .* In contrast, *Wedgewood's federal litigation involves its claim that [Petitioners] violated its procedural due process rights by enacting the Instructions*" that imposed the limit on commercial development. (Petition Appx., at 14a; emphasis added.) "[T]he harm alleged and the relief sought [in the state and federal proceedings] are distinct." (*Id.*)

The Court of Appeals did not act as "a zoning board of appeals." Respondent's appeal from the denial of its application for a building permit was

adjudicated in the state courts. The Court of Appeals acted within its authority when it affirmed the District Court's ruling that Petitioners violated Respondent's federal due process rights by enacting the illegal limit on commercial development.

2. The United States Court of Appeals for the Sixth Circuit has not created a "federal law of zoning."

Petitioners also claim that review by this Court is necessary because the Court of Appeals purportedly created a "federal law of zoning." (Petition, at 9.) As explained below, the Court of Appeals properly applied Ohio state property law to define Respondent's underlying property interests, and then properly applied federal constitutional law to determine whether those property interests are protected by the federal Due Process Clause.

In order to establish a procedural due process claim, a plaintiff "must establish three elements: (1) that [plaintiff] has a life, liberty or property interest protected by the Due Process Clause; (2) that [plaintiff] was deprived of this protected interest within the meaning of the Due Process Clause; and (3) that the state did not afford adequate procedural rights prior to depriving [plaintiff] of the protected interest." *Chandler v. Village of Chagrin Falls*, 296 Fed. Appx. 463, 469 (6th Cir. 2008).

Petitioners do not contest Respondent's proof of the second and third elements: it is no longer disputed that Respondent was deprived of its existing

zoning classification (and corresponding right to use its property for a Wal-Mart store) when Petitioners announced a new zoning "regulation," without any notice or opportunity to be heard, that imposed new restrictions prohibiting that use of the land. Petitioners challenge the ruling below only with respect to the first element: they claim that Respondent had no protected property interest in the uses of its land that were permitted by the existing zoning classification, and that it therefore has no remedy for Petitioners' illegal attempt to deprive it of those uses.

The Sixth Circuit Court of Appeals properly followed this Court's previous rulings when it found that Respondent had a protected property interest under Ohio law in the existing zoning classification. This Court described the attributes of property interests in *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of a constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

408 U.S. at 577. The *Roth* Court explained that property interests – *i.e.,* legitimate expectations or entitlements – are created by state laws and other non-federal rules and understandings that affect property rights:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577. *See Town of Castle Rock v. Gonzales,* 545 U.S. 748, 756 (2005), *quoting Roth.* In the present case, Respondent had a justifiable expectation under Ohio law that it could use its land in the ways that were permitted by the existing zoning regulations unless new regulations were lawfully enacted.

State law defines the property interests that landowners justifiably expect to enjoy, but federal constitutional law necessarily determines whether the extent of the owners' entitlement to those property interests warrants protection under the federal Due Process Clause. *See Castle Rock, supra,* 545 U.S. at 756-57:

> We will not, of course, defer . . . on the ultimate issue: whether what Colorado law has given respondent constitutes a property interest for purposes of the Fourteenth Amendment [Due Process Clause]. *That*

> *determination, despite its state-law underpinnings, is ultimately one of federal constitutional law.*

(Emphasis added.) *See also Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 9 (1978) ("[a]lthough the underlying substantive [property] interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause") (*quoting Roth, supra,* 408 U.S. at 577). This analytic framework does not create a "federal law of zoning."

The Sixth Circuit Court of Appeals has consistently followed this precedent. *See, e.g., Chandler, supra,* 296 Fed. Appx. at 469 (applying Ohio state law to determine the requisite "property interest," and then applying federal law to determine whether that property interest is "constitutionally protected" by the Due Process Clause) (*citing Roth*, *supra*, and *Castle Rock*, *supra*); *Mater v. City of Ecorse,* 301 Fed. Appx. 476, 479 (6th Cir. 2008) (using Michigan state law to define the property interests at issue and federal law to determine whether those property interests are "protected by . . . due process").

In the present case, the District Court recognized that "[p]roperty rights 'are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law,'" *quoting Roth.* (Petition Appx., at 121a-122a.) It also

recognized that "[p]roperty interests protected by the due process clause must be more than abstract desires or attractions to a benefit. [*Citing Roth.*] The due process clause protects only those interests to which one has a 'legitimate claim of entitlement.' [*Quoting Roth.*]" (*Id.*, at 122a.) The District Court then used state law to determine the scope of Respondent's property interest and federal law to determine that this property interest is protected by due process guarantees.

The Court of Appeals also relied on *Roth, supra,* when it affirmed that ruling. "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," and "a party obtains a protected property right under the Fourteenth Amendment when it can demonstrate a 'legitimate claim of entitlement' or a 'justifiable expectation'. . . ." (Opinion, at 21a.) It concluded, "consistent with *Roth*," that:

> Wedgewood had a "justifiable expectation" that its zoning classification – its right to develop up to 220,857 square feet of commercial space on [its land] – was vested unless or until [Petitioners] passed an amendment to the [zoning plan] comporting with the notice and hearing requirements set forth in Ohio Rev. Code §519.12 * * * [W]e hold that the Instructions . . . unlawfully amended [the

> existing zoning plan] . . . in violation of the Due Process Clause and Ohio Rev. Code §519.12.

Id., at 25a, 27a.)

The Sixth Circuit did not create a "federal law of zoning" in its ruling below. It applied well-settled federal due process law after it determined "whether [Respondent] established a vested property interest" under "substantive state zoning laws." (*Id.*, at 21a.) The Court of Appeals expressly addressed Petitioners' argument that Respondent had no property interest under Ohio law unless it applied for a building permit before Petitioners announced the new illegal zoning regulations, and it properly rejected that argument because Respondent does not claim a property interest in a building permit. (*Id.*)

Petitioners rely upon *Gibson v. Oberlin*, 171 Ohio St. 1 (1960), and *Zaremba Development Co. v. Fairview Park*, 84 Ohio App.3d 174 (1992), to support their contention that a landowner has no property interest in the potential uses of the land that are permitted by existing zoning regulations unless and until it applies for a building permit. The landowners in those cases were not challenging illegal zoning regulations; they claimed they had a property interest in building permits that the defendants had refused to grant. Respondent's claim for a building permit was adjudicated in the state courts and is *not* at issue in the present case. Respondent asserts a property interest in the uses of its property that are

allowed by the existing, valid zoning classification, which has not been legally amended and therefore remains in effect.

Ohio law has always recognized that landowners have a property interest in the use of their lands. "The rights related to property, *i.e.*, to acquire, use, enjoy, and dispose of property . . . are among the most revered in our law and traditions." *City of Norwood v. Horney*, 110 Ohio St.3d 353, 362 (2006). In *City of Akron v. Chapman*, 160 Ohio St. 382, 388 (1953), the Supreme Court of Ohio held that a landowner had a property interest in continuing to use its property in ways that were prohibited by new zoning regulations even though it had never applied for a building permit:

> What is property? It has been defined as not merely the ownership and possession of lands or chattels but the unrestricted right of their use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. . . .
>
> The right to continue to use one's property in a [way] . . . which was lawful at the time it was acquired is within the protection of Section 1, Article XIV, Amendments, Constitution of the United States, and Section 16, Article I of the Ohio Constitution, which provide that no person shall be deprived of life, liberty or property without due process of law.

In *Union Oil Co. v. City of Worthington*, 62 Ohio St.2d 263 (1980), the Court held that a property owner could bring a declaratory judgment action to challenge the constitutionality of zoning legislation that "proscribe[d] the property owner's proposed use of the property"; the declaratory judgment was entered *before* the landowner applied for a building permit. 62 Ohio St.2d at 265. *See also Superior Hauling, Inc. v. Allen Township Zoning Board of Appeals*, 172 Ohio App.3d 313, 317 (2007):

> A township [zoning] regulation or rule that exceeds statutory limits is invalid and unenforceable. . . . Thus, when R.C. 519.211 expressly denied the township's authority to zone the use of public-utility properties, any township zoning ordinance that attempted to do so was a nullity. . . . *For a zoning provision to be enforceable, it must . . . be properly enacted by the township.*

(Emphasis added.) Although the landowner applied for a variance *after* the zoning regulations were enacted, the Court found in *Superior Hauling* that he had a right to "challenge the authority of the appellees to regulate" the property. 172 Ohio App.3d at 318. *See also Robert Weiler Co. v. Kingston Township, Ohio*, No. 2:07-cv-760, 2009 WL 890538 (S.D. Ohio 2009), in which the Court held that a landowner could properly assert a procedural due process claim even though the defendant township had imposed a moratorium that prevented him from applying for a

zoning permit until after it had amended its zoning regulations to prohibit the proposed use.

Petitioners contend that Respondent cannot have a property interest in their compliance with the Ohio statutory requirements for adopting zoning regulations, which in this case required notice and a hearing. *But Respondent does not claim a property interest in these statutory procedures,* and the Court of Appeals did not address that issue. It found that Respondent had a property interest in "*its zoning classification – its right to develop commercial space on subarea 3, which was vested unless and until the Commission and Trustees passed [a lawful] amendment" to the zoning regulations.* (Petition Appx., at 25a; emphasis added).

The Court of Appeals did not err when it rejected Petitioners' argument that "[b]ecause Wedgewood submitted its application post-Instructions . . . [it] cannot demonstrate a vested property interest in its zoning classification." (Petition Appx., at 23a.) Respondent's property interest in the uses of its land that were permitted by the existing regulations necessarily continued to exist unless and until those regulations were lawfully amended. *See, e.g., Robert Weiler Co., supra,* (finding a "procedural due process injury" where the defendant township did not "evaluate the application under the zoning resolution in effect at that time, as required by Ohio law"); *Stile v. Copley Township,* 115 F.Supp.2d 854, 865, fn. 21 (N.D. Ohio 2000) (finding that a landowner's property interest in the uses of the land that were permitted

by zoning regulations had vested, for due process purposes, even though he did not file a valid application for a zoning permit prior to the defendant's unlawful amendment of the regulations).

The Court of Appeals properly concluded that Respondent had a "justifiable expectation" that it would be able to exercise its right under the existing regulations to build a Wal-Mart store on its property, and thus had "a protected property right under the Fourteenth Amendment," unless and until Petitioners adopted valid regulations that prohibited it. (Petition Appx., at 24a-25a.) Petitioners argue at length that Respondent could not have a justifiable expectation that it would obtain a building permit because there are no substantive limits on their discretion to approve or deny its application. But the Court of Appeals did *not* find that Respondent had a protected property interest in the building permit; it found that Respondent had a property interest in the uses of its land that were allowed by the existing zoning classification, and *Petitioners did not have discretion to arbitrarily and illegally announce new restrictions.*

Finally, a writ of certiorari would be particularly inappropriate in this case because the lower courts also found that Petitioners' 500,000 square-foot limit on commercial development violated Ohio Rev. Code §519.12. This conclusion, standing alone, would support the injunction that was entered against Petitioners in this case. Moreover, the Court of Appeals did not reach another alternative ground for the

District Court's injunction order; the new zoning restriction that Petitioners tried to impose is also void because it is unconstitutionally vague. In any event, the Sixth Circuit has not created a "federal law of zoning," and there are no compelling reasons for this Court to review its decision.

C. There are no compelling reasons for this Court to review the Court of Appeals' ruling on abstention.

Petitioners also challenge the Sixth Circuit's decision to decline pendent appellate jurisdiction over the District Court's decision denying Petitioners' abstention claims. (Petition, at 29-33.) But the question they present under Supreme Court Rule 14.1(a) is whether the Sixth Circuit "can interpret the abstention doctrine" as it did. (Petition, at i.) This question was not addressed in the Sixth Circuit's opinion, which did not "interpret" any of the abstention doctrines. Instead, the Sixth Circuit decided that it had no appellate jurisdiction to consider the District Court's ruling on abstention. (Petition Appx., at 12a-13a.) Tellingly, Petitioners do not identify the abstention doctrine that the Sixth Circuit purportedly interpreted, and they do not explain how the Sixth Circuit misinterpreted it.

This Court does "not decide in the first instance issues not decided below," even if they were briefed in the Court of Appeals. *See, e.g.*, *NCAA v. Smith*, 525

U.S. 459, 470 (1999). Nor does it consider issues discussed "in the text of [a] petition for certiorari" if they are not "fairly included in the question presented for our review" under Rule 14.1(a). *Wood v. Allen*, ___ U.S. ___, 130 S. Ct. 841, 851 (2010) The Sixth Circuit did not decide any question about abstention. Petitioners do not ask this Court to consider the issue that the Sixth Circuit did decide: that it lacked appellate jurisdiction over the abstention ruling in this interlocutory appeal.

Regardless, Petitioners do not satisfy Supreme Court Rule 10 as to either abstention or the pendent jurisdiction issues. They do not even claim that the decisions below on these issues conflict with decisions of this Court or of the other circuit courts. Petitioners' sole argument is that the Sixth Circuit "ignored" its own Sixth Circuit precedent. (Petition, at 30.) That is not a compelling reason to issue a writ of certiorari.

CONCLUSION

For the reasons set forth above, Respondent asks the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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